



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 23, 2004

Ms. Jennifer Soldano
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2004-6162

Dear Ms. Soldano:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 205690.

The Texas Department of Transportation (the "department") received a request for information concerning the department's determination, based on medical opinions developed by a named medical consultant, of the requestor's eligibility to take leave from her employment with the department pursuant to the Family Medical Leave Act (the "FMLA"). You claim that the requested information is excepted from disclosure under sections 552.101 and 552.102 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (allowing any person to submit comments indicating why requested information should or should not be released).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes, including the Family and Medical Leave Act (the "FMLA"), section 2654 of title 29 of the United States Code.

¹Although you raise section 552.102, you make no arguments regarding its applicability to the submitted information. Therefore, we do not address the applicability of this exception to the submitted information.

Section 825.500 of title 29 of the Code of Federal Regulations provides record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 states that

[r]ecords and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements . . . , except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). We understand you to assert that the submitted information is maintained as information related to medical certifications, recertifications or medical histories created for purposes of the FMLA, and that it is therefore confidential under the FMLA.

In this instance, however, the requestor argues that she has a right of access to the submitted information under section 825.307(d) of title 29 of the Code of Federal Regulations (giving employee right of access to second and third medical opinions, upon request, in instances where employer who has reason to doubt validity of medical certification submitted by employee requires employee to obtain second and third opinions from either employee's health care provider or a health care provider designated or approved jointly by employer and employee). The department, on the other hand, asserts that the submitted information is not a second or third opinion as described by section 825.307(d), in part because the department did not require the requestor to obtain the medical opinions. Whether the submitted information constitutes a second or third opinion as contemplated by section 825.307(d) presents a fact issue. This office cannot resolve factual disputes in the opinion process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Accordingly, if the department determines that the submitted information constitutes a second or third opinion as contemplated by section 825.307(d), it must release the information to the requestor. However, if the department determines that the submitted information is not a

second or third opinion as contemplated by section 825.307(d), we find that, as none other of the release provisions found in the FMLA applies to this information, the submitted information is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the FMLA.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

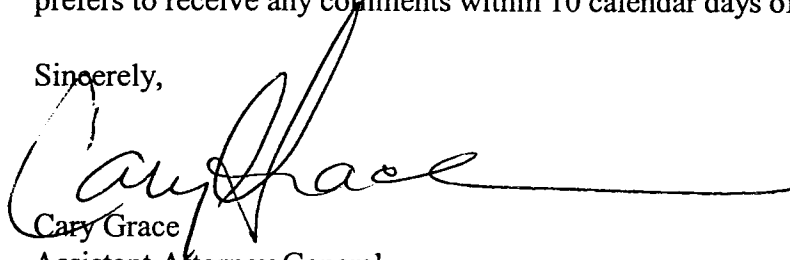
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cary Grace
Assistant Attorney General
Open Records Division

ECG/sdk

Ref: ID# 205690

Enc. Submitted documents

c: Ms. Ellen Abernathy
13307 Wisterwood
Austin, Texas 78729
(w/o enclosures)